152 US 252

RECORD, CASE No. 14,050.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 114.

THE JOHNSON COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM WHARTON, JUNIOR, & COMPANY, LIMITED, TO THE USE OF WILLIAM WHARTON, JUNIOR, & COMPANY, INCORPORATED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED JUNE 6, 1890.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 3, 1893.

1 UNITED STATES, } *sct:*
Eastern District of Pennsylvania, }

The President of the United States to the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, Greeting:

Because that in the record and process and also in the rendering of judgment in a suit before you, between William Wharton, Junior, and Company, Limited, a partnership association, limited, organized and doing business under and by virtue of the laws of the State of Pennsylvania and a citizen thereof, to the use of William Wharton, Junior, and Company, incorporated, a corporation organized and doing business under and by virtue of the laws of the State of Pennsylvania and a citizen thereof, *vs.* The Johnson Company (incorporated and formerly doing business under the name of the Johnson Steel Street Rail Company), a corporation organized and doing business under and by virtue of the laws of the State of Kentucky and a citizen thereof, defendant, in a plea of assumpsit, a manifest error hath intervened, to the great damage of the said The Johnson Company (incorporated and formerly doing business under the name of the Johnson Steel Street Rail Company), a corporation organized and doing business under and by virtue of the laws of the State of Kentucky and a citizen thereof, as in their complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that, if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the honorable the justices of the Supreme Court of the United States, sitting at Washington, D. C., on the second Monday of October next, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Seal U. S. Circuit Court, E. D. Pennsylvania.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, this 23rd day of April, A. D. one thousand eight hundred and ninety, and in the one hundred and fourteenth year of the Independence of the said United States.

SAMUEL BELL,
Clerk of Circuit Court U. S.

2 THE UNITED STATES OF AMERICA, *ss:*

To William Wharton, Junior, and Company, Limited, a partnership association, limited, organized and doing business under and by virtue of the laws of the State of Pennsylvania and a citizen thereof, to the use of William Wharton, Junior, and Company, incorporated, a corporation organized and doing business under and by virtue of the laws of the State of Pennsylvania and a citizen thereof, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, wherein The Johnson Company (incorporated and formerly doing business under the name of the Johnson Steel Street Rail Company), a corporation organized and doing business under and by virtue of the laws of the State of Kentucky and a citizen thereof, is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, shall not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this twenty-fourth day of April, in the year of our Lord one thousand eight hundred and ninety.

W. McKENNAN, *Cir. Judge.*

I accept service of the above citation for William Wharton, Jr., & Co., Limited, to use, &c., and request the clerk of the Supreme Court of the United States to enter my appearance as attorney for defendant in error.

JOHN G. JOHNSON,
Per F. P. PRICHARD.

April 28, 1890.

[Endorsed:] S. C. U. S. Johnson Company *v.* Wm. Wharton, Jr., & Co., L't'd, to use, &c. Citation.

3 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

WILLIAM WHARTON, JUNIOR, AND COMPANY, Limited, a Partnership Association, Limited, Organized and Doing Business under and by Virtue of the Laws of the State of Pennsylvania and a Citizen Thereof, to the Use of William Wharton, Junior, and Company, Incorporated, a Corporation Organized and Doing Business under and by Virtue of the Laws of the State of Pennsylvania and a Citizen Thereof,

vs.

THE JOHNSON COMPANY (Incorporated and Formerly Doing Business under the Name of the Johnson Steel Street Rail Company), a Corporation Organized and Doing Business under and by Virtue of the Laws of the State of Kentucky and a Citizen Thereof.

No. 8. October Sess., 1889.

UNITED STATES OF AMERICA, *Eastern District of Pennsylvania*, } *ss:*

4 Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of October session, 1889, No. 8.

It is thus contained:

Be it remembered that on the 27th day of September, A. D. 1889, the plaintiff, by its attorney, John G. Johnson, Esquire, comes into court here and sues forth therefrom a writ of summons against the Johnson Company (formerly doing business under the name of the Johnson Steel Street Rail Company), which, with the endorsement and return thereto, is in the words and figures following, to wit:

5 UNITED STATES, *Eastern District of Pennsylvania*, } *sct:*

The President of the United States to the marshal of the eastern district of Pennsylvania, Greeting:

We command you that you summon the Johnson Com-
[SEAL.] pany (incorporated and formerly doing business under the name of the Johnson Steel Street Rail Company), a corporation organized and doing business under and by virtue of the laws of the State of Kentucky and a citizen thereof, late of your district, if it may be found therein, so that it be and appear before the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, of the third circuit, at a session

of the same court to be holden at Philadelphia on the first Monday of October next, to answer to William Wharton, Junior, and Company, Limited, a partnership association, limited, organized and doing business under and by virtue of the laws of the State of Pennsylvania and a citizen thereof, to the use of William Wharton, Junior, and Company, incorporated, a corporation organized and doing business under and by virtue of the laws of the State of Pennsylvania and a citizen thereof, in a plea of assumpsit; and have you then there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, this 27th day of September, A. D. 1889, and in the 114th year of the Independence of the United States.

SAMUEL BELL,
Clerk of Circuit Court U. S.

6 [Endorsed:] No. 8. Circuit court, October session, 1889. Wm. Wharton, Junior, and Co., Limited, &c., *vs.* The Johnson Company, &c. Summons. Assumpsit. Returnable on the first Monday of October next. John G. Johnson, attorney for plaintiff. Filed October 7, 1889.

October 5, 1889, at Philadelphia, in my district, served the within writ on the Johnson Steel Street Rail Company by giving a true and attested copy *copy* thereof to John F. Estrom, the agent of the said company, and making known the contents to him.

So answers—

A. H. DILL, *U. S. Marshal,*
Per ABRAM B. MYERS, *Deputy.*

7 And afterwards, to wit, on the first day of October, A. D. 1889, the plaintiff, by *their* attorney, comes into court here and files a statement of plaintiff's demand in the words and figures following, to wit:

WILLIAM WHARTON, JR., & CO., LIMITED, to Use of William Wharton, Jr., & Co., Incorporated,
vs.
THE JOHNSON STEEL STREET RAIL CO.

Statement of Plaintiff's Demand.

Plaintiff claims to recover from the defendant the amount of royalty or license fee due under a written agreement, a copy of which is annexed, for guard rails sold or delivered by defendant between January 10, 1888, and June 4, 1889. Plaintiff avers
8 that defendant commenced and has continued to the present time the sale of guard rails under the said agreement of license; that defendant voluntarily rendered statements and paid the royalties thereunder down to January 1st, 1887; that defendant

refused to pay the royalties due between January 1st, 1887, and January 10, 1888, on the ground that the rails sold by it were not covered by the patent referred to in said agreement, and that in a suit brought by plaintiff against defendant in the circuit court of the United States for the eastern district of Pennsylvania, to April sessions, 1888, No. 14, the court delivered an opinion deciding that the said rails so sold by defendant were covered by said patent, and entered judgment in favor of plaintiff for the amount of royalties to January 10, 1888; that from and after January 10, 1888, and down
9 to the expiration of the patent, on June 4, 1889, the defendant continued to sell, under said agreement, rails of the same character as those on which they voluntarily paid royalty to January 1, 1887, and as those which the court decided were covered by the said patent as aforesaid. Defendant has refused to render to plaintiff a statement of the number of tons of such rails sold and delivered between January 10, 1888, and June 4, 1889, but plaintiff believes that defendant has sold and delivered during said period about two thousand tons of such rails and therefore claims to recover from the defendant the sum of ten thousand dollars, with interest, which amount plaintiff avers is justly due to it. In case upon discovery by defendant of the exact amount of such
10 rails sold and delivered it should appear that defendant is indebted to plaintiff in a larger amount than ten thousand dollars, plaintiff then claims to recover such larger amount than ten thousand dollars.

Plaintiff further avers that the defendant corporation is doing business in the eastern district of Pennsylvania and has a permanent office in the city of Philadelphia, in said district, with an officer or agent duly appointed thereto in charge of the defendant's business.

JOHN G. JOHNSON,
Att'y for Pl'ffs, H.

CITY OF PHILADELPHIA, *ss:*

Wm. Wharton, Jr., being duly affirmed, says: I am the president of the plaintiff. The matters alleged in the foregoing state-
11 ment are true to the best of my knowledge, information, and belief.

WM. WHARTON, JR.

Affirmed and subscribed to before me this 28th day of Sept., A. D. 1889.

EVAN J. LESTER,
[SEAL.] *Notary Public.*

12 *Copy of Agreement of License.*

Whereas, letters patent of the United States of America were granted to William Wharton, Jr., of the city of Philadelphia and State of Pennsylvania, for an improved guard rail numbered 127,665, and dated the fourth day of June, eighteen hundred and seventy-

two, and were by him assigned to William Wharton, Jr., and Co., Limited, of said city and State.

Now the said William Wharton, Jr. & Co. Limited, does hereby give and grant unto the said Johnson Steel Street Rail Company, of Johnstown, Pennsylvania, a license under the above-mentioned letters patent, to make and to sell to others to use, in the United States of America and the territories thereof, during the term for which the said letters patent have been granted, guard rails con-
13 structed according to the specifications attached to the said letters patent, upon the following terms and conditions:

First. This license shall apply only to such guard rails as are known as "girder guard rails."

Second. The said Johnson Steel Street Rail Company, on or before the tenth day of each January and July, shall deliver to the said William Wharton, Jr. & Co., Limited, a statement signed by its secretary or treasurer, setting forth the weights of the various lots of rails sold by it under the terms of this license which were delivered to the purchaser thereof during the six calendar months then next preceding, and also the several dates when such lots were delivered.

Third. The said Johnson Steel Street Rail Company shall,
14 on or before the tenth day of each January and July pay to the said William Wharton, Jr. & Co. Limited, a royalty or license fee upon all the rails sold and delivered under the terms of this license during the six calendar months then next preceding, at the rate of five dollars per ton of twenty-two hundred and forty pounds.

Fourth. The said Johnson Steel Street Rail Company shall stamp every rail made or sold under the terms of this license in a conspicuous place with the date of the said letters patent, according to the provisions of the law regulating patents.

Fifth. The first statement to be rendered and the first payment to be made under the terms of this license, to wit, January, 1886, shall include all the steel curved grooved rails sold and de-
15 livered by the Johnson Steel Street Rail Company at any time previous to the end of the year eighteen hundred and eighty-five.

Executed in duplicate the twenty-fourth day of November, A. D. eighteen hundred and eighty-five.

(Signed) WILLIAM WHARTON, JR., *Pres't.*
RICHARD ASHHURST, *Sec'y.*

The Johnson Steel Street Rail Company hereby accepts the foregoing license on the terms therein stated.

January tweny-third, 1886.

(Signed) JOHNSON STEEL STREET RAIL CO.,
Per A. J. MOXHAM, *Pres't.*

(Signed) JOHN TOWNSEND, *Sec'y.*

(Endorsed:) Oct. 5th, 1889, at Philadelphia, in my district, served the within statement on the Johnson Steel Street Rail Com-
16 pany by giving a true and attested copy thereof to John F. Ostrom, the agent of the said company, and making known the contents of the same to him. So answers— A. H. Dill, U. S. marshal, per Abram B. Myers, deputy. No. 8. Oct. sess., 1889, U. S. C. C. Wm. Wharton, Jr., & Co., Limited, to use, &c., *vs.* The Johnson Co. Statement of plaintiffs' demand. Filed Oct. 1st, 1889. John G. Johnson, att'y for pl'ffs.

17 And afterwards, to wit, on the 25th day of October, A. D. 1890, the defendant-, by their attorneys, come into court here and files their affidavit of defense, which, being read, is in the words and figures following, to wit:

United States Circuit Court in and for the Eastern District of Pennsylvania.

WM. WHARTON, JR., AND CO., LIMITED, to Use of Wm. Wharton, Jr., and Co., Incorporated, *vs.* THE JOHNSON STEEL STREET RAIL COMPANY.	No. 8. Oct. Sess., 1889.

STATE OF PENNSYLVANIA, *County of Cambria,* } *ss:*

Arthur J. Moxham, being duly sworn according to law, deposes and says that he is the president of the company defendant,
18 which company is now known under the name of the Johnson Company, and that the said company has a just and true defense to the plaintiff's claim, the nature and character of which is as follows:

It is true that the plaintiff and defendant entered into a certain agreement of license, of which the paper annexed to the plaintiff's statement is believed by this deponent to be a true copy, but the defendant prays that, for greater certainty, the original may be produced.

Deponent states that during the period from the tenth day of January, 1888, to the fourth day of June, 1889, during which period the plaintiff alleges that the defendant made no statement, etc., the defendant company manufactured no curved guard rails of steel which had a hard-rolled surface or skin, but alleges that in
19 all curved guard rails of steel manufactured by them during that period the surface contained no hard surface or skin, but was the softest portion of the rail; all of which this defendant expects to prove.

Deponent states that during the period from the tenth day of January, 1888, to the fourth day of June, 1889, during which period the plaintiff alleges the defendant has made no statement, etc., the defendant corporation manufactured no rails such as are described and claimed in letters patent number 127,665, dated June 4th, 1872, granted to William Wharton, Jr.

Deponent states that during the period from the tenth day of January, 1888, to the fourth day of June, 1889, during which period the plaintiff alleges the defendant has made no statement, etc., the defendant company did not manufacture and sell two thou-
20 sand tons of girder guard rails.

ARTHUR J. MOXHAM.

Sworn and subscribed before me this twenty-second day of October, A. D. 1889.

ROB'T S. MURPHY,
[SEAL.] *Notary Public.*

(Endorsed:) United States circuit court in and for the eastern dist. of Penna. Wm. Wharton, Jr., & Co., Limited, to use of Wm. Wharton, Jr., & Co., incorporated, *vs.* The Johnson Steel Street Rail Company. Affidavit of defense. Filed Oct. 25, 1889.

21 And afterwards, to wit, on the 26th day of October, A. D. 1889, the plaintiff-, by their attorneys, come into court here and enters a rule on defendant to show cause why judgment should not be entered against defendant for want of a sufficient affidavit of defence, which, being read, is in the words and figures following, to wit:

WM. WHARTON, JR., & Co.
vs.
THE JOHNSON STEEL ST. R. CO. } U. S. C. C., Oct. Sess. 1889. No. 8.

Enter rule on defendant to show cause why judgment should not be entered against it for want of a sufficient affidavit of defence, returnable on Tuesday, Nov. 5, 1889, at 10 a. m.

(Endorsed:) No. 8. Oct. sess, 1889. U. S. C. C. Wharton *vs.* Johnson Co. Rule for judgment for want of a sufficient affidavit of defense. Filed Oct. 26, 1889. J. G. Johnson.

22 And afterwards, to wit, on the 4th day of November, A. D. 1889, defendant-, by their attorneys, come into court here and files their affidavit of defense, which, being read, is in the words and figures following, to wit:

United States Circuit Court in and for the Eastern District of Pennsylvania.

WM. WHARTON, JR., & CO., LIMITED, to Use of Wm. Wharton, Jr., & Co., Incorporated, *vs.* THE JOHNSON STEEL STREET RAIL CO. | No. 8. Oct. Sess., 1889.

STATE OF PENNSYLVANIA, *County of Cambria,* } *ss:*

Arthur J. Moxham, being duly sworn according to law, deposes and says that he is the Arthur J. Moxham, president of the
23 company defendant, who has heretofore made an affidavit in this action on behalf of the defendant.

Deponent states that on or about the 31st day of May, 1889, the books and papers of defendant company were destroyed by a flood which occurred at that period; that it is impossible for him to ascertain the number of rails or the quantity of rails manufactured by him at any time prior to the said date of the said flood; that deponent is positive, and therefore states upon information and belief, that during the period from the tenth day of January, 1888, to the fourth day of June, 1889, during which period the plaintiff alleges the defendant has made no statement, etc., that defendant company manufactured and sold considerably less than two thousand tons of girder guard rails. Deponent is unable to verify
24 this statement from his books on account of the loss of said books, as hereinbefore set out, but he verily believes that statement to be true.

ARTHUR J. MOXHAM.

Sworn and subscribed before me this 1st day of November, A. D. 1889.

STATE OF PENNA., *County of Cambria.*

Before me, a notary public in and for said State, personally came Arthur J. Moxham, above named, who, being duly sworn according to law, deposes and says that the facts set forth in the above and foregoing affidavit are true and correct to the best of his knowledge and belief.

Sworn and subscribed before me this 1st day of November, A. D. 1889.

ROBT S. MURPHY,
[SEAL.] *Notary Public.*

25 (Endorsed:) U. S. circuit court in and for the eastern district of Pennsylvania. No. 8. Oct. sess., 1889. Wm. Wharton, Jr., & Co., L't'd, to use of Wm. Wharton, Jr., & Co., incorporated, *vs.* The Johnson Steel Street Rail Company. Filed Nov. 4, 1889. George Harding, G. J. Harding, att'ys for defendant.

26 And afterwards, to wit, on the 23rd day of November, A. D. 1889, the defendant-, by their attorneys, come into court here and files their affidavit of defence, which, being read, is in the words and figures following, to wit:

United States Circuit Court in and for the Eastern District of Pennsylvania.

WILLIAM WHARTON, JR., & COMPANY, LIMITED, to Use of William Wharton, Jr., & Company, Incorporated,
vs.
THE JOHNSON STEEL STREET RAIL COMPANY.
No. 8. October Session, 1889

STATE OF PENNSLYVANIA, *County of Cambria*, } *ss.:*

Arthur J. Moxham, being duly sworn according to law, deposes and says—

27 That he is the president of the company defendant, which company is now known under the name of the Johnson Company, and that the said company has a just and true defense to the whole of the plaintiff's claim in this suit, the nature and character of which is as follows:

The deponent admits that the plaintiff entered into an agreement of license, of which the paper annexed to the plaintiff's statement is believed to be a true copy, which agreement purports to license the defendant to make and sell for others to use guard rails constructed according to the specifications attached to letters patent No. 127,665, dated June 4th, 1872. The said license provided that it should apply only to such guard rails as are known as girder guard rails; all of which appears by the copy of said license annexed to the plaintiff's statement.

28 This deponent further avers that said letters patent, both in the specifications thereof and in the claim, covered only such curved guard rails of steel on which a hard-rolled surface or skin had been secured and retained in the process of manufacture in said letters patent described, and did not purport to cover or in fact or in law cover the manufacture of any other description of curved guard rails of steel whatever. This deponent admits that the defendant did manufacture and sell between January 10th, 1888, and June 4th, 1889, certain girder guard rails of steel. The quantity of said rails so manufactured and sold by the defendant it is now impossible to state with accuracy because of the terrible flood at Johnstown on the 31st day of May, 1889, in which flood all the company's papers and accounts relating to said manufacture

29 were swept away and utterly destroyed. This deponent has endeavored to form the most reliable and accurate judgment possible for him to form under the circumstances as to the probable amount of girder guard rails manufactured by the defendant company between said dates last named, and he states said amount to be twelve hundred tons.

This deponent admits that no such statement as is contemplated by the license was rendered by the defendant to the plaintiff of the manufacture by the latter of girder guard rails between said dates last named, for the reason that the girder guard rails so manufactured by the defendant were not such girder guard rails as were covered by said letters patent or by said license granted thereunder, for the reason that none of said girder guard rails has any hard surface or skin, but the surface or skin of the same was in
30 fact the softest portion of the rail.

The deponent further admits that the suit mentioned in the plaintiff's statement was brought and decided as therein stated; but the deponent is advised that said decision is not binding in this case, because the amount involved in the former suit was so small as not to entitle the defendants to a writ of error on the said judgment to the Supreme Court of the United States, whereas the amount involved in this suit is sufficient to so entitle the defendant. Deponent therefore avers that the right of the defendant to have the issues involved in this case adjudicated by the Supreme Court of the United States, if a decision adverse to it is rendered by this court, cannot be taken away from it by reason of a former trial and judgment between the same parties, where the amount in-
31 volved did not entitle the defendant to a review of the same.

ARTHUR J. MOXHAM.

Sworn and subscribed before me this 21st day of November, A. D. 1889.

ROBERT S. MURPHY,
[SEAL.] *Notary Public in and for the State of Pennsylvania, at Johnstown, Cambria Co.*

(Endorsed:) 8. October sessions, 1889. C. C. U. S., E. D. of Pa Wm. Wharton, Jr. & Co., L't'd, *vs.* Johnson Steel St. Rail Co. Affidavit of defence. Filed Nov. 23, 1889. Harding; MacVeagh.

32 And afterwards, to wit, on the 9th day of April, A. D. 1890, this cause being called for argument on rule for judgment for want of a sufficient affidavit of defense, and having been argued by counsel for the respective parties and duly considered by the court, it is ordered that the rule be made absolute and judgment entered in favor of plaintiffs and against the defendant for want of a sufficient affidavit of defense.

33 And afterwards, to wit, on the 22nd day of April, A. D. 1890, the plaintiff comes into court here and files an assessment of damages; which, being read, is as follows, to wit:

WM. WHARTON & CO., LIMITED, vs. THE JOHNSON CO. } U. S. C. C., E. D. Pa., Oct. Sess., 1889. No. 8.

Assessment of Damages.

License fee on 1,200 tons rails, the amount admitted in the affidavit of defense, at five dollars per ton	$6,000 00
Interest from June 4, 1889, to April 10, 1890	306 00
	$6,306 00

The clerk will please assess the damages in the above case at the sum of six thousand three hundred and six dollars, as above.

JOHN G. JOHNSON,
Per F. P. P.,
Att'y for Pl'ff.

34 (Endorsed:) S. Oct. sess., 1889, U. S. C. C., E. D. of Pa. Wharton *vs.* Johnson. Assessment of damages. Filed April 22, 1890. J. G. Johnson.

And afterwards, to wit, on the 22nd day of April, A. D. 1890, the clerk assesses the damages at six thousand three hundred and six dollars.

Whereupon judgment in favor of plaintiff and against the defendant for the sum of six thousand three hundred and six dollars.

35 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

WM. WHARTON, JR., & CO., LIMITED, to the Use of Wm. Wharton, Jr., & Co., Incorporated, vs. JOHNSON COMPANY. } No. 8. October Sess., 1889.

Know all men by these presents that we, Johnson Company and the Commonwealth Title Insurance and Trust Company, are held and firmly bound unto Wm. Wharton, Jr., and Co., Limited, to the use of Wm. Wharton, Jr., & Co., incorporated, in the full and just sum of twelve thousand six hundred and twelve dollars ($12,612), to be paid to the said Wm. Wharton, Jr., & Co., Limited, to the use of Wm. Wharton, Jr., & Co., incorported, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23rd day of April, A. D. 1890.

Whereas lately, at a term of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a suit depending in said court between Wm. Wharton, Jr., & Co., Limited, to the use of Wm. Wharton, Jr., & Co., incorporated, plaintiff, and Johnson Company, defendant, judgment was rendered against the said defendant, and the said defendant, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and
36 a citation directed to the said plaintiff, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next ensuing:

Now, the condition of the above obligation is such that if the said Johnson Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHNSON COMPANY, [SEAL.]
Per A. J. MOXHAM, *Pres't.*

Attest: W. McLAIN, *Sec'y.*

THE COMMONWEALTH TITLE INSURANCE AND TRUST CO.,
By HENRY M. DECHERT, *President.*

Attest: —— ——, *Sec'y & Treas.* [SEAL.]

Sealed and delivered in presence of—
—— ——.

Approved:
WM. McKENNAN, *Cir. Judge.*

[Endorsed:] No. 8. October sess., 1889. Circuit court United States. Wm. Wharton, Jr., & Company, Limited, &c., *vs.* Johnson Company. Bond surwrit of error.

37 UNITED STATES OF AMERICA, } *sct:*
Eastern District of Pennsylvania, }

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of William Wharton, Jr., & Co., Limited, &c., to use of William Wharton, Jr., & Co., incorporated, *vs.* The Johnson Company, &c., No. 8, October session, 1889, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 30th day of April, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fourteenth.

Seal U. S. Circuit Court, E. D. Pennsylvania.

SAMUEL BELL,
Clerk of C. C.

Endorsed on cover: Case No. 14,050. E. Pennsylvania C. C. U. S. No. 114. The Johnson Company, plaintiff in error, *vs.* William Wharton, Junior, & Company, Limited, to the use of William Wharton, Junior, & Company, incorporated. Filed June 6, 1890.

Office Supreme Court U.
FILED.
OCT 31 1893
JAMES H. McKENNEY,
CLERK

No. 114. October Term, 1893.

Supreme Court of the United States.

The Johnson Company, Plaintiff in Error,

vs.

William Wharton, Jr., & Co. Limited, to the use of William Wharton, Jr., & Co. Incorporated.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF OF PLAINTIFF IN ERROR.

GEORGE J. HARDING,
GEORGE HARDING,
WAYNE MACVEAGH,
For Plaintiff in Error.

Allen, Lane & Scott, Prs., Phila.

SUPREME COURT OF THE UNITED STATES.

The Johnson Company, Plaintiff in Error,

vs.

William Wharton, Jr., & Co. Limited, to use, &c.

October Term, 1893.

No. 114.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The action in the court below was *assumpsit*, brought by the Wharton Company, the defendant in error, to recover from the Johnson Company, the plaintiff in error, certain royalties or license fees claimed to be due under an agreement of license to the Johnson Company to make and to sell to others to use curved girder guard rails constructed according to the specifications attached to the Wharton Company's letters patent No. 127,665. The agreement of license is set forth at page 5 of the Record. The royalties claimed were for rails sold or delivered by the defendant between January 10th, 1888, and June 4th, 1889. The Wharton Company had recovered from the Johnson Company in a previous action in the same court, under the same agreement, a judgment for a sum less than $5000 as royalties claimed to be due for a prior period. The

defense set up in that cause was that the rails sold by the defendant were not covered by the patent, and were not within the operation of the license. The court, however, decided otherwise, and as the judgment was not subject to review by this court it was, of course, paid. The plaintiff then brought the present action, relying upon the prior adjudication as conclusive of its right to recover. (Record, page 4.)

The defendant filed an affidavit of defense averring, as before, that the plaintiff's letters patent covered only such curved guard rails of steel on which a hard-rolled surface or skin had been secured and retained in the process of manufacture, and did not purport to cover, or in fact or in law cover, the manufacture of any other description of curved guard rails whatever; that the curved guard rails of the defendant's manufacture were not of this kind, and that therefore the plaintiff had no claim for license fees. The fact of the adjudication of the question adverse to it for the prior period was admitted, but it was denied that this judgment was binding upon it as an estoppel, because the judgment was below the sum which allows a writ of error from this court, while the present suit was for a sum which allowed such a writ. The court, however, entered judgment for want of a sufficient affidavit of defense, and damages were assessed at $6306. (Record, pages 11 and 12.)

SPECIFICATIONS OF ERROR.

1. The Circuit Court of the United States for the Eastern District of Pennsylvania erred in ordering that the plaintiff's rule for want of a sufficient affidavit of defense be made absolute, and in directing judgment to be entered in favor of the plaintiff and against the defendant for want of a sufficient affidavit of defense.

2. The said court erred in not discharging the plaintiff's rule upon the defendant for want of a sufficient affidavit of defense.

ARGUMENT.

The inquiry raised by this case presents an important phase of the always interesting question, of the scope and limitations of suitors' rights before this court, under our Federal judiciary system.

The framers of the Constitution, in giving to the Supreme Court appellate jurisdiction both as to law and fact of certain classes of cases, with such exceptions and under such regulations as Congress should make, intended, as we know, that this court should be the final expositor of the law applicable to the facts, in cases properly brought before it under the system of procedure subsequently to be established by the legislative body. The writ of error in this case was taken for the purpose of having an authoritative declaration upon the merits of the contention of the defendant in error, embodied in the judgment of the court below, that in a certain class of cases properly upon its docket this Supreme Court is practically without jurisdiction to determine finally the law as applied to the facts, but must recognize as conclusive and final the judgments and decrees of the subordinate tribunal.

The essential question of law in dispute between the Johnson Company and the Wharton Company was whether a patent for curved girder rails with a hard surface or skin, owned by the latter, covered the rails with a hard surface or skin made and sold by the former. This question has never been decided by this court. The Judiciary Act of 1789, as amended by the Act of 1875, declares that all final judgments of any Circuit Court, * * * in civil actions, * * * where the matter in dispute, exclusive of costs, exceeds the sum or value of $5000, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error.

The matter in dispute, as shown by the judgment, was $6306.

The court below, without giving reasons, directed the entry of judgment against the defendant for want of a sufficient affidavit of defense, on the ground that the essential question was *res judicata* by a prior judgment of the same court in a

case between the same parties, where the same legal question had been raised, upon a claim for a prior installment of license fees.

The defendant's claim, as made in its affidavit of defense, that the prior judgment for a sum below the limit of this court's jurisdiction could not lawfully be made effective to prevent this court from passing upon the essential question on its merits in a case within its jurisdiction, was negatived.

That the lower court's position is erroneous, it is submitted, must appear when the intended and actual function of this court, as a court of last resort is considered. It was intended that litigants within the limits of the court's jurisdiction, might have the merits of their controversies passed upon by this court. There is no room for the theory that the court, with acknowledged jurisdiction of any particular case, was intended to be a mere organ of expression by way of echo of the views of the lower court. And yet this is the practical result of the conclusion arrived at by the court below, that the prior judgment against the defendant for an amount below the limit of this court's jurisdiction was conclusive of the defendant's rights.

The plaintiff in error recognizes the full scope and force of the law of estoppel of a *res judicata*. And it is not contended here that, generally speaking, the judgment or decree of a lower court of record unappealed from, where the right to a review exists, is not conclusive of the rights of the parties in respect to the matters in issue.

Beloit *vs.* Morgan, 7 Wall., 619, 622;
Cromwell *vs.* County of Sac., 94 U. S., 351.

Where, however, under the Federal Statutes, no right to a writ of error or appeal exists in a particular case, it is respectfully submitted that the plain intent of the law constituting this court a court of review of the merits of cases within its jurisdiction, denies to the conclusion of a lower Federal court the force of an estoppel in a subsequent case within the limits of this court's jurisdiction, where the question is distinctly raised in the court below. The strictness with which this

court maintains the limits of its jurisdiction based upon the amount in controversy is well illustrated by those cases which hold that nothing collateral to the judgment or decree can be used to establish jurisdiction where the judgment or decree itself is below the statutory limit.

Troy *vs.* Evans, 97 U. S., 1;
Elgin *vs.* Marshall, 106 U. S., 578, 581;
Opelika City *vs.* Daniel, 109 U. S., 108;
New Jersey Zinc Co. *vs.* Trotter, 108 U. S., 564;
Bruce *vs.* Manchester & Keene Railroad, 117 U. S., 514;
New England Mortgage Security Co. *vs.* Gay, 145 U. S., 123.

But the same strictness of interpretation clearly requires, on the other hand, that, jurisdiction being established, it be made effective to bring within the cognizance of the court all questions of fact and law properly raised in the court below, independent of technical rules of estoppel, the operation of which, however general in extent, cannot be made to deprive litigants of substantive rights.

The practical results of such a rule of law as that affirmed by the court below present a very persuasive argument against its soundness. In very many cases it is quite competent for the plaintiff to divide his causes of action and to limit the amount in his first suit below the sum allowing an appeal. Securing a judgment in his favor for the amount he has thus limited, he is then at liberty to abrogate the defendant's right of appeal in all subsequent suits, without reference to the amounts involved.

It may be said that in pursuing such a course he incurs the risk of a final judgment against him, as well as in his favor; but it must be remembered that as he alone is to exercise the option he will only do so when a previous decision of the court below, or some other information leading him to suppose he can forecast its decision, causes him to believe that he is entirely safe in doing so. Meanwhile his unfortunate adversary is left absolutely at his mercy, for if the court

below is believed to be the more favorable forum for the plaintiff, the amount for which suit is brought will of course be limited so as to prevent an appeal when the controversy is put at issue in the larger litigation; while if the plaintiff supposes this court is the more favorable forum for him, he will, equally, of course, sue for an amount which will entitle him to its judgment.

It is confidently submitted that this court will not construe the doctrine of estoppel so as to produce a result so contrary to justice and to the equality of suitors at its bar.

GEORGE J. HARDING,
GEORGE HARDING,
WAYNE MACVEAGH,
For Plaintiff in Error.

Office Supreme Court U. S.
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CLERK.

No. 114. October Term, 1893.

Supreme Court of the United States.

The Johnson Company, Plaintiff in Error,

vs.

William Wharton, Jr., & Co. Limited, to use, &c., Defendants in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR DEFENDANTS IN ERROR.

FRANK P. PRICHARD,
JOHN G. JOHNSON,
For Defendants in Error.

Lane & Scott, Pr., Phila.

SUPREME COURT OF THE UNITED STATES.

The Johnson Company, Plaintiff in Error, vs. *William Wharton, Jr., & Co. Limited, to use, &c., Defendants in Error.*	October Term, 1893. No. 114.

BRIEF FOR DEFENDANTS IN ERROR.

It will avoid some confusion of thought if, in discussing this case, the exact question presented by the record is kept clearly in mind.

The action in the court below was a common-law action of *assumpsit* for royalties under a license agreement. A previous common-law action of *assumpsit* for royalties due for a prior period had been tried in the same court and had resulted in a judgment for plaintiff. The plaintiff in his statement in the present action recited the facts that a prior action had been brought in the same court for royalties under the same agreement; that a certain defense had been set up therein, and that the issue thus raised had been decided in favor of plaintiff by final judgment. (Record, page 4, folio 8.) The defendant in his affidavit of defense set up the same defense as before and admitted that this issue had been decided in favor of plaintiff in the prior suit, but averred that this decision was not binding, because the amount involved in the prior case was so small that defendants were not entitled to a writ of error to the Supreme Court therein. (Record, page 11, folio 30.)

The question thus presented to the court below was whether its own previous final judgment upon the identical issue between the same parties was conclusive. The court held that it could not retry an issue once concluded by its own final judgment, and this ruling is now assigned as error. This is the question and the only question raised by the case. It is not whether the original judgment was correct or even what is its effect in this court, but what was its effect on a subsequent trial of the same issue in the court which rendered it. Either this court must lay down the principle that the court below was not bound to regard as conclusive its own final judgment on the identical issue between the same parties, or it must hold that the court did not commit error in giving effect to that judgment. The issue is sharply defined and there is no middle course.

No rule of law is of more general application than the rule that a judgment of a court of competent jurisdiction is conclusive between the parties as to the issue decided. The most recent writer on this subject thus speaks of the rule :—

> That the solemn and deliberate sentence of the law pronounced by its appointed organs upon a disputed fact or state of facts should be regarded as a final and conclusive determination of the question litigated, and should forever set the controversy at rest, is a rule common to all civilized systems of jurisprudence. But it is more than a mere rule of law. It is more even than an important principle of public policy. It is not too much to say that this maxim is a fundamental concept in the organization of every jural society. * * * It would be useless to recapitulate the eulogiums which courts and judges have lavished upon this most salutary doctrine. It is so firmly rooted as a cardinal principle of our legal system that he who praises its wisdom or its beneficial effects praises the law itself.
>
> Black on Judgments, section 500.

And Mr. Freeman, in his work on Judgments, says :—

> The word "estoppel" as associated with judgments has ceased to be odious. It is more than freed from approbrious appellations; the vocabulary of the judges has been well nigh exhausted to supply it with honorable and endearing titles.

And again :—

A judgment is a bar not because a party has done some act which precludes him from asserting a right or title ; it is properly a bar on principles of public policy, because the peace and order of society, the structure of our judicial system and the principles of our government require that a matter once litigated should not again be drawn in question between the same parties or their privies.

Freeman on Judgments, section 247.

The rule itself is thus clearly defined by Mr. Black :—

A point which was actually and directly at issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, cannot be again drawn in question in any future action between the same parties or their privies, whether the causes of action in the two suits be identical or different.

Black on Judgments, section 504.

And the judgments within the above rule are thus accurately classified by Mr. Herman :—

Judgments and decrees having the authority of *res judicatæ* are, first, those rendered in courts of final or last resort, or those against which an appeal is not allowed, either because of some statutory provision fixing the amount in controversy from which an appeal is allowable, as in the United States Courts, where no case involving less than $5000 is reviewable in the Supreme Court of the United States, or cases in which the parties have failed to procure and perfect their appeal within the statutory time allowed ; second, where the parties have acquiesced in the judgment or voluntarily satisfied it.

Herman on Estoppel and *Res Judicata*, section 48.

As is the case with most general rules, the application of it frequently works hardship in particular cases, but it is founded on a wise public policy, and the certainty of, and public confidence in, the administration of justice which are secured by a strict adherence to the rule are of more importance than its effect in particular instances. Hence the courts have uniformly refused to depart from it because of any real or apparent hardship caused by its enforcement. This is well illustrated by the following statements from section 249 of Freeman on

Judgments, each of which is supported by citations of authorities :—

Nor can the effect of a judgment as *res judicata* be avoided by showing that though an appeal was attempted to be taken the judgment was affirmed without considering the cause on its merits because of the absence of a sufficient assignment of errors, or of some other defect in the appellate proceeding.

The discovery of new evidence not in the power of the party at the former trial forms no exception to the rule in relation to estoppels whether the second action is at law or in equity.

Neither can the force of a judgment as *res judicata* be destroyed or impaired by showing that it was clearly erroneous and ought not to have been rendered, whether such error resulted from the court drawing an erroneous conclusion from conceded or established facts, or making a ruling during the progress of the trial whereby evidence was erroneously admitted or excluded or the law misstated to the jury, or one of the parties was otherwise deprived of the benefit of his cause of action or defense or of some part thereof.

Nor is the effect of a judgment as *res judicata* lessened when the fact that it is erroneous is established by the decision of the highest appellate tribunal in the State rendered in another action.

The fact that the amount in controversy is so small that the defeated party has no right of appeal does not make the judgment any the less conclusive when the same question arises in a subsequent litigation, though the amount there involved is sufficiently large to support an appeal.

A case very similar to the present case arose in

Griffin, Receiver, *vs.* The Long Island R. R., 102 N. Y., 449.

In that case a prior judgment had been rendered on the same issue, upon which plaintiff had no appeal as matter of right, although the lower court could, in the exercise of its discretion, have allowed an appeal if application, had been made. The Court of Appeals said (page 452) :—

In regard to the case now considered, the legality of the plaintiff's appointment was expressly raised by the pleadings, litigated on the

trial and determined by the court in a former action. Whether it was rightly or wrongly determined is a question that cannot be raised in this action. Even if the decision was wrong it does not impair the effect of the former judgment as a bar to the right to raise the same question, nor does it change the effect of the judgment because the amount recovered was not sufficient to entitle the plaintiff to appeal as a matter of right from the General Term to this court. It might as well be urged that the opposite party would not be bound when the right of appeal existed and the party failed to make the appeal. This rule would be more especially applicable here as it does not appear that any application was made to the General Term to allow the defendant to appeal, and it therefore cannot be said that the defendant might not have obtained the permission to do so had he made an application for that purpose in due season.

The substantial question in the present case in another form has been repeatedly before this court. In

Elgin *vs.* Marshall, 106 U. S., 578,

a judgment for less than $5000 was recovered on interest coupons, and this court was asked to take jurisdiction on the ground that the issue decided affected the whole principal of the bonds. This court declined to do so. In the course of the opinion Mr. Justice Matthews said:—

It is true that the point actually litigated and determined in this action was the validity of the bonds, and as between these parties in any subsequent action upon other coupons, or upon the bonds themselves, this judgment, according to the principles stated in Cromwell *vs.* County of Sac, 94 U. S., 351, might, and as to all questions actually adjudged would, be conclusive as an estoppel.

This was followed by the case of—

Opelika City *vs.* Daniel, 109 U. S., 108,

in which the plaintiff in a suit on $24,000 of bonds amended his claim so as to include only ninety of the coupons, thus reducing his verdict to $4755.64, and obtaining a judgment, which, though conclusive in a subsequent suit for the principal, was final and without appeal. This court, however, was powerless to give relief.

These cases have been affirmed and followed in—

Gibson *vs.* Shufeldt, 122 U. S., 27;
New England Mortgage Co. *vs.* Gay, 145 U. S., 123;
Washington, &c., R. R. *vs.* Dist. of Col., 146 U. S., 227;
United States *vs.* Wanamaker, 147 U. S., 149.

In Washington, &c., R. R. Co. *vs.* Dist. of Col., *supra*, Mr. Chief Justice Fuller said:—

> No matter that it may appear that the judgment would be conclusive in a subsequent action, it is the direct effect of the judgment that can alone be considered.

And in New England Mortgage Co. *vs.* Gay, *supra*, Mr. Justice Brown said:—

> It is well settled in this court that when our jurisdiction depends upon the amount in controversy it is determined by the amount involved in the particular case, and not by any contingent loss either one of the parties may sustain by the probative effect of the judgment, however certain it may be that such loss will occur.

It has been said that the decisions in this court above cited involved substantially the same question as is involved in this case in a somewhat different form. In those cases, as in this, the result worked out by an adherence to the law as it had been interpreted by the courts was that a judgment in a case involving so small an amount that an appeal could not be taken was conclusive in subsequent cases involving amounts sufficiently large to give jurisdiction on appeal, and in those cases, as in this, the court was asked to do violence to the law in order that this result might not be reached. It does not seem to have occurred to either counsel or court in those cases that if the first judgment in the smaller case was held to be final it could be other than conclusive in the larger suit, and the cases were argued and decided on the assumption that it would be so conclusive. This court, having decided that it could not remedy the supposed hardship by disregarding the established interpretation of the statute and entertaining the appeal in the smaller case, is now asked to accomplish the same result by disregarding a thoroughly settled and important rule of law in the larger case, the real object in both cases being to obtain, by judicial legislation, an amendment of the statute regulating appeals and writs of error.

It is submitted that the principles and authorities referred to or cited show that not only was the action of the court below in giving conclusive effect to its own judgment correct,

but also that it was the only action which the court could have taken without violating a well settled and universal rule of law, and therefore its judgment should not be reversed.

It remains only to notice the argument contained in the brief of plaintiff in error. Two serious defects are apparent in that argument.

First, it deals with the case as if the question was as to the conclusive effect of the first judgment in this court, instead of as to its effect in the court below.

Second, it urges that a well-established rule of law, applicable to this case, should be in some way, not very clearly pointed out, abrogated or avoided in order to remedy a suggested hardship in this particular case.

The claim made on behalf of plaintiff in error seems to be that a suitor has a right to have a case involving over $5000 heard in this court on its merits, and that the effect of the action of the court below was to take away that right. The conclusive answer to this is that the right which a suitor has in this court is not to have a case retried upon its merits, but in certain cases to have reviewed any *errors* committed by the court below. If no reviewable errors are committed by the court below, its judgment is just as conclusive upon the merits when the case involves more than $5000 as when it involves less than that amount. Whether the case involves less than $5000, and hence cannot be reviewed by writ of error, or whether it involves more than $5000 and no reviewable error is committed, in either case the defeated party has no right to a review by this court. When the first case was tried involving less than $5000, the judgment therein was final and conclusive, and is to be given its full effect in law. When the second case was tried this prior judgment was necessarily conclusive on the court below. When afterwards the judgment in the second case is brought before this court, it is an

incorrect use of terms to say that this court is bound by the first judgment or that such is the effect of the second judgment. The fact is, that if this court was considering the merits of the case *de novo* neither judgment would be binding upon it. But what this court is really considering is whether the record discloses any error in the action of the court below, and this involves the direct question, not whether the first judgment is conclusive in this court, but whether it was conclusive in the court below. If it was the court below was right in so holding, and the judgment should be affirmed.

As was said by Chief Justice Waite in
Scotland County *vs.* Hill, 112 U. S., 183;

> The question here is not one of authority, but of adjudication. If there has been an adjudication which binds the plaintiff, that adjudication, whether it was right or wrong, concludes him until it has been reversed or otherwise set aside in some direct proceeding for that purpose.

In that case conclusive effect was given in the United States courts to a previous final judgment in the State courts, even though this result was in direct conflict with a decision of the United States Supreme Court in another case.

Equally fallacious is the argument based on the supposed hardship of the case. Courts of last resort sit to administer justice by the application of general rules, which because experience has shown that they work justice in the greatest number of cases are enforced irrespective of their effect on the parties to any particular suit. To such a wise and universal rule as the one that an issue once fought out to final judgment is conclusive upon the parties, it is no answer to say that in any particular case it works hardship. But the supposed hardship in the present case is apparent rather than real. It will be seen by inspection of the license agreement (Record, page 5, folio 12) that the license fees were payable semi-annually. The present suit was for three of the semi-annual periods. If the plaintiffs had chosen to bring a separate suit at the end of each of these periods the judgment in each of these suits would have been less than $5000, and the

defendant could have had no pretense of a right to take a writ of error. Defendant had no inalienable right to an appeal to this court, and the plaintiffs could have prevented such an appeal just as easily by bringing separate suits for each installment as by bringing a suit for three installments and setting up the conclusive effect of the prior judgment.

Nor does it appear by anything that is in this record that if the case had been retried by the lower court and decided in favor of plaintiff, the court below would have necessarily committed reviewable error. The defendants' affidavit does not set up any actual commission of reviewable errors in the first judgment. It does not state whether the issue in the previous case was one of law or of fact, and if of fact whether any reviewable error was committed by the court. The contention is that if the first case was of such an amount that errors, if committed, could not be reviewed, it is not conclusive in the same court in another case involving such an amount that errors, if committed, could be reviewed. The effect which might result from this shows how dangerous it would be to depart from a well-settled rule in order to prevent some supposed hardship. Suppose this court reverses the judgment and directs the court below to retry the issue disregarding the previous final judgment, and then suppose, what is quite possible, that when the court below retries the issue the defendant gains it upon the facts, and no reviewable errors of law are committed, the result would be two inconsistent final judgments of the same court upon the same issue between the same parties. It was for the express purpose of avoiding such a result that the rule of law as to the conclusiveness of judgments was established.

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For Defendant in Error.